

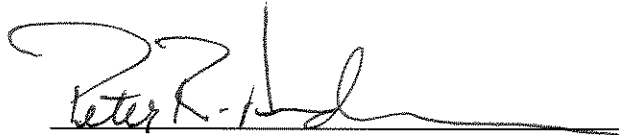
**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR )  
TRANSFER NO. 67067 (formerly known )  
as 5647) and APPLICATIONS FOR )  
PERMIT NOS. 72-07577 and 72-07578 )  
IN THE NAME OF MARK L. and/or )  
JOANNE LUPHER, dba EPICENTER )  
AQUACULTURE )  
\_\_\_\_\_ )

**ORDER DENYING  
PETITION FOR  
RECONSIDERATION**

The *Petition for Reconsideration of Recommended Default Order* filed by the applicants in this matter on November 17, 2006, is hereby DENIED pursuant, in part, to the findings in the attached Exhibit A.

Dated this 7<sup>th</sup> day of December, 2006.



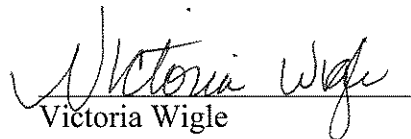
Peter R. Anderson  
Hearing Officer

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December 2006, I delivered the foregoing document by U.S. mail, postage prepaid and properly addressed to the following:

BRUCE M. SMITH  
MOORE SMITH BUXTON & TURCKE, CHTD  
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ROBERT E WILLIAMS  
FREDERICKSEN WILLIAMS & MESSERVY  
PO BOX 168  
JEROME ID 83338



Victoria Wigle  
Administrative Assistant to the Director  
Idaho Department of Water Resources

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**ORDER ON SHOW CAUSE  
HEARING**

**FINDINGS OF FACT**

1. This matter involves for Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 in the name of and Mark L. Lupher and Jo Anne W. Lupher dba Epicenter Aquaculture (the "Applicants"). The Applicant's interest in the property upon which the applied-for permits would be developed, and their interest in the water right to be transferred is pursuant to a lease dated July 1, 1994 between Ingram Warm Springs Ranch and Mark Lupher and Jo Anne W. Lupher (the "Lease Agreement").
2. The following chronology applies to the processing of Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 and the Applicant's leasehold interest in the place of use in question:
  - a. July 1, 1994: Lease Agreement effective.

- b. October 11, 1999: Date of a Notice of Default under the "Default" provision on page 11 of the Lease Agreement sent by L& M Angus Ranch, successor to the Ingrams, to the Applicants.
- c. October 14, 1999: Application for Permit Nos. 72-07577 and 72-07578 fully submitted to IDWR. Both Applications indicate that the "arrangement enabling the applicant to make this filing" is the Lease Agreement.
- d. December 14, 1999: Transfer of Water Rights No. 5647 fully submitted to IDWR. The Transfer indicates that the document which shows the Applicants ownership of the water right to be transferred, Water Right License No. 72-07209, is the Lease Agreement.
- e. January 10, 2000: Protests to Application for Permit Nos. 72-07577 and 72-07578 filed by L & M Angus Ranch.
- f. February 17, 2000: Protest to Transfer of Water Rights No. 5647 filed by L & M Angus Ranch (the "Protestant").
- g. June 15, 2000: Date of letter from the Protestant notifying the Applicants that they continue to be in default under the lease.
- h. June 21, 2000: Joint prehearing conference held by IDWR regarding Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647. The Protestant argued that IDWR could not approve the Applications and Transfer because the Lease Agreement was in default and/or the Applicants did not own the land.
- i. July 5, 2000: IDWR issues order authorizing discovery.

- j. October 5, 2000: Protestants file a Motion to Compel Discovery.
- k. November 14, 2000: IDWR issues its *Order Denying Motion to Compel*.

IDWR indicated to the parties, regarding the question of whether or not the Applicants had defaulted upon their lease, that:

IDWR is fully aware that this issue is crucial to the Applicants' ability and authority, or not, to proceed with these Applications. Resolution of this question, however, is better left to another forum and discovery under that forum's authority. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.") In fact, the lease itself provides that any dispute regarding the lease must be submitted to arbitration. Lease Agreement at page 10. When either the Applicants or the Protestant submit an indication that the question of default has been submitted to arbitration IDWR will stay these matters until that arbitration has been completed, and then reflect in its decisions the determination of the arbitration panel.

- l. December 15, 2000: Prehearing Conference. At this conference the Applicants indicated that they had filed an action for declaratory judgment on the Lease Agreement, Custer Co. Case No. CV-00-101.
- m. December 29, 2000: IDWR issues an *Order Staying proceedings and Setting Status Conference*. The Order provides, in part, that "all contested case proceedings on these applications are STAYED pending resolution of Custer Co. Case. *Sic* No. CV-00-101, so long as the Applicants exercise reasonable diligence in the prosecution of that action."

- n. March 30, 2001: At a status conference the Applicants indicated that the declaratory judgment action is proceeding. A summary judgment motion had been filed by the Protestants in District Court, arguing that the appropriate forum was arbitration, as provided by the Lease Agreement. The Applicants indicated that the summary judgment motion would be argued within 45 days.
- o. July 2, 2001: Summary judgment argument. At the February 22, 2002, show cause hearing the Protestant represented that it argued in District Court that the Lease Agreement provided for binding arbitration, and Applicants argued in District Court that the arbitration contemplated by the Lease was non-binding. The Applicants did not disagree with this representation at the show cause hearing.
- p. September 14, 2001: The parties indicate that the District Court has directed them to arbitrate the Lease Agreement dispute.
- q. December 7, 2001: Prehearing Conference. At the conference the Applicants indicate that they are preparing a letter to Protestants regarding selection of an arbitrator. Both parties indicate that arbitration will likely take a least 6 months.
- r. February 22, 2002: At the, show cause hearing the parties indicated that an arbitrator still had not been selected. The Applicants indicated that they would do everything within their power to complete arbitration within

sixty days. The Protestant indicated that six months was more realistic. The Protestants stated that they would accept binding arbitration. Whether or not the arbitration is binding and final is completely within the hands of the Applicants.

### CONCLUSIONS OF LAW

1. As a part of the decision regarding Application for Permit Nos. 72-07577 and 72-07578, the Director of IDWR is required to determine whether the application for the new water right permits is made for speculative purposes or whether the applicant has sufficient financial resources with which to complete the work involved. Idaho Code § 42-203A(5)(c) and (d). *See also* IDAPA 37.03.08.040.05.e.i and 37.03.08.045.01.c.i. The Idaho Supreme Court has stated, "The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself." *Lemmon v. Hardy*, 95 Idaho 778, 781 (1974).
2. Idaho's water right transfer statutes provide that only a "person entitled to the use of water or owning any land to which water has been made appurtenant" may apply to transfer that water. I.C. § 42-108, I.C. § 42-222(1) ("Any person, entitled to the use of water whether represented by license... by claims...or by decree, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change."). Ownership of a legal interest in a water right is a prerequisite for a person's ability to change a water right. *Federal*

*Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.").

3. Applicants knew within days of filing Application for Permit Nos. 72-07577 and 72-07578 in October 1999 that there was a dispute regarding the Lease Agreement. The existence of this dispute was reiterated to them many times. In November 2000 the Applicants were informed in the *Order Denying Motion to Compel* that arbitration appeared to be necessary. Now, more than two years after they were informed of the possible default and over a year after the written decision staying this matter, Applicants indicate to IDWR that they would try to complete arbitration within sixty days of February 22, 2002. Applicants control whether arbitration will finally resolve the lease dispute. With reasonable diligence, Applicants can finally resolve the dispute over the Lease Agreement within six months of the February 22, 2002, show cause hearing.

Base upon the foregoing it is hereby ORDERED that the Applicant submit to IDWR on August 30, 2002, final resolution of the Lease Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647.



Dated this 12<sup>th</sup> day of April, 2002.



PETER R. ANDERSON  
HEARING OFFICER

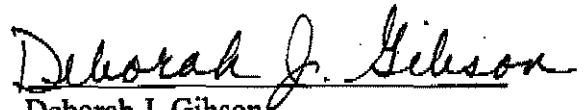
### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of April, 2002, I delivered the foregoing  
**ORDER ON SHOW CAUSE HEARING** by U.S. mail, postage prepaid and properly addressed  
to the following:

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Deborah J. Gibson  
Administrative Assistant  
Water Allocation Bureau